Supreme Court, U.S.
FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM 1998

GORDON NDUBISI OKOLI,

Petitioner

VERSUS

UNITED STATES OF AMERICA

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

/s/Benn Hamilton
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QUESTIONS PRESENTED

1.) Whether a defendant may be tried in his absence after a trial court has determined that his absence is voluntary but has not made that determination after the balancing of the likelihood of soon having the trial with the defendant's presence against the inconvenience or prejudice occasioned by a slight delay or rescheduling of the trial?

2.) What steps must be taken by the Court of Appeals to begin a de novo review of an alleged violation of the Fourth Amendment to the United States' Constitution due to an improper search and seizure, and whether in the instant case a violation there was an improper search and seizure in violation of the Fourth Amendment to the United States Constitution?

LISTS OF INTERESTED PARTIES

The following are parties to this proceeding:

The United States of America

Gordon Ndubisi Okoli

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FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, **Gordon Ndubisi Okoli**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is unpublished, and appears in Appendix A of this petition. The unpublished opinion of the United States District, Eastern District of Texas, Tyler Division court appears in Appendix B of this petition. The district court's denial of the petitioner's motion to suppress evidence appears in Appendix E.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals in this matter was filed on September 23, 1998. A petition for rehearing was not filed. This Court's jurisdiction is invoked under Title 28. U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution (Appendix C); Federal Rule of Criminal Procedure, Rule 43 (Appendix D).

STATEMENT OF THE CASE

On June 27, 1995, the petitioner was driving a 1993 Mercury automobile on U.S. 59 when Trooper Barry Washington was finishing a previous traffic stop on the side of the road. As Trooper Washington viewed the petitioner's vehicle as it went by, he stated that instead of moving to the inside lane he stayed in the lane closest to the shoulder, passing right by Trooper Washington, and the other stopped vehicle.

U.S. Highway 59 is a four lane highway with a divided median. It has two northbound and two southbound lanes. Trooper Washington observed petitioner's vehicle move approximately six inches onto the improved shoulder of the road twice. Trooper Washington thought that the driver of the vehicle might have been sleepy, taking medication, or intoxicated. After Trooper Washington stopped the petitioner he decided that none of the aforementioned was the case, and decided to write him a warning ticket.

While standing at the rear of the petitioner's vehicle, Trooper Washington stated that he thought he smelled dryer sheets. He began to question the petitioner about his travels, and requested to search the vehicle. With petitioner's consent he began to inspect the vehicle. He searched the trunk, and then proceeded to the interior of the automobile. The trooper thought that the door pane had been previously removed, and

attempt to look inside the space between the glass and the body of the vehicle. He stated he saw what appeared to be plastic inside. Trooper Washington then further detained the petitioner, and called for a drug sniffing dog to come to the scene, as well as back up.

The dog alerted the handler to the right rear passenger door. The door panel was removed, and approximately five kilograms of cocaine wrapped in newspaper, cellophane, and dryer sheets were recovered. Mr. Okoli was then placed under arrest.

On July 11, 1995 a grand jury returned a two count indictment against petitioner, Gordon Ndubisi Okoli. He was charged with unlawfully possessing with intent to distribute cocaine in violation of 21 U.S.C. 841(a)(1).

The petitioner filed a motion to suppress the evidence on August 3, 1995. A hearing was held on this issue on October 13, 1995, and the court issued an order denying the motion to suppress evidence. A one day jury trial was held on October 25, 1995. However, petitioner's counsel objected and requested a continuance because the defendant was absent and his whereabouts unknown. After a brief hearing, where the trial judge determined that the petitioner was voluntarily absent, the trial proceeded and the jury returned a verdict of guilty.

On January 20, 1998 the petitioner was sentenced to a 151 month

prison term to be followed by 5 years supervised probation and a $50 special assessment. On January 26, 1998 the petitioner filed a written notice of appeal. On September 23, 1998 the United States Court Appeals for the Fifth Circuit denied the petitioner's appeal in an unpublished per curiam opinion.

REASONS FOR GRANTING WRIT

Certiorari should be granted for the following reasons: This case presents the issue of whether a defendant may be tried in his absence after a trial court determination that his absence is voluntary but has not made that determination after balancing of the likelihood of soon having the trial with the defendant's presence against the inconvenience or prejudice occasioned by a slight delay or rescheduling of the trial. Moreover, this case presents the issue of what steps must be taken by the Court of Appeals to begin a de novo review of an alleged violation of the Fourth Amendment to the United States' Constitution due to an improper search and seizure and whether in the instant case a violation there was an improper search and seizure.

Federal Rule of Criminal Procedure, Rule 43 requires that a defendant be present at his trial. The rule does not necessarily require the defendant's continued presence if he has voluntarily absented himself. *Id.* However, in United States v. Benavides, 596 F.2d 137 (C.A.5 (Tex.) 1979)., the Fifth Circuit Court of Appeals ruled that a trial court had

> [A]bused its narrow discretion by proceeding to trial without attendance of the [defendants] and without making an inquiry into whether or not the trial could soon be rescheduled with the defendant's attendance.

The Court also stated that the:

> [T]he court only has "narrow discretion" in deciding whether to proceed with a trial when the defendant is voluntarily In absentia because the right to be present at one's own trial must be carefully safeguarded.
>
> *Id.*

The Fifth Circuit cited the preceding opinion when it gave reasons for its decision in United States v. Beltran-Nunez, 716 F.2d 287 (C.A.5 (Tex.) 1983) where it also found that the trial court had abused its discretion in proceeding with the trial in the absence of the defendant. In Beltran-Nunez, the Court explained:

> The teaching of *Benavides* and the cited jurisprudence of other circuits is that the important constitutional right of a criminally accused to be present at his trial cannot cursorily, and without inquiry, be deemed by the trial court to have been waived simply because the accused is not present when he should have been. Before exercising its narrow discretion to commence or continue the trial in the defendant's absence, the ***trial court must at the time make a record inquiry to attempt to ascertain the explanation for the absence of the accused and whether, balancing the likelihood that the trial could soon take place with the defendant's presence against the undue inconvenience or prejudice occasioned by***

> ***a slight delay or a rescheduling of the trial***, the district court could properly exercise its narrow discretion to commence or continue the trial in the absence of the accused. (Emphasis Added).
>
> *Id.* at 291.

In the instant case, the trial court only made a determination that Mr. Okoli had voluntarily absented himself from the appearance at his trial. However, the court did not complete the analysis by balancing the likelihood of securing his presence against any inconvenience or prejudice associated with rescheduling or slightly delaying the trial. Under the Fifth Circuit's own jurisprudence, this constituted a reversible error.

There is some agreement among the circuits on this matter as evidenced by the Second Circuit decision of United States v. Totora, 464 F.2d 1202 cert. denied, 409 U.S. 1063, 93 S.Ct. 554, 39 L.Ed.2d 516, which is cited in both of the aforementioned Fifth Circuit opinions. However, without a succinct statement from this Honorable Court as to how to balance the defendant's constitutional right to be present at his trial against the inconvenience associated with rescheduling or delaying the trial, disarray is just around the corner. This case represents the perfect opportunity for this Court to emphatically state what must be done before a trial can proceed without the presence of a defendant. In the alternative, this Court should at least remand the case back to the Fifth Circuit Court of

Appeals for a ruling consistent with the Benavides and Beltran-Nunez decisions.

In Orlenas v. United States, 116 S.Ct. 1657, 517 U.S. 690, 134 L.Ed. 911 (1996), this Court held that "determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Cited as reasons was the Fourth Amendment's demonstration of a "strong preference for searches conducted pursuant to a warrant", and that "police are more likely to use the warrant procedure if the scrutiny applied by a magistrate's probable cause determination to issue a warrant is less than that for warrantless searches."*Id.*

In the instant matter, the Fifth Circuit Court of Appeals did not issue a published opinion with its decision on petitioner's appeal of United States v. Okoli, No. 6:95CR00033-001 (E.D. Tex., Jan. 21, 1998). In fact, in the per curiam opinion issued by the Court on September 23, 1998 the Court simply stated that "We have reviewed the record and the briefs of the parties and find no reversible error." This terse statement, in no way suggests a de novo review of the questionable search and seizure as required by Orlenas. Some analysis of the facts and the application of the law should have been included, so at the very least a de novo review could be done at the next level. Since this Court has noted the importance of the de novo review of searches and seizures, this case represents the perfect

opportunity to state what is required for there to be a valid de novo review. However, even if we assume arguendo that the Fifth Circuit did a de novo review, and upheld the search, the Orlenas opinion suggests that The United States Supreme Court should also conduct a de novo review.

The Fifth Circuit has stated in the case of United States v. Robinson, 6 F.3d 1088, 1092 (C.A. 5 (Tex.)1993) that the same Trooper Washington who stopped Mr. Okoli "in the past five years, ...had arrested 250 people on drug charges, all after traffic stops." Furthermore, they also stated that "this court has become familiar with Trooper Washington's propensity for patrolling the Fourth Amendment's outer frontier."*Id.* This type of behavior which at the very minimum consistently borders on infringing on citizens' Fourth Amendment protections, is exactly the type of tactics which this Court in its Orlenas stated that the de novo review was designed to curtail. Thus, even if this Court finds that the Fifth Circuit conducted a de novo review of the search and seizure in this case, at a very minimum, this Court should examine the specific factual circumstances of this case to determine whether Mr. Okoli's Fourth Amendment rights were violated by Trooper Washington.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter. If this Court elects not to address the issues presented in this writ at this time, it suggested that the writ issue anyway and that this matter be remanded to the Court of Appeals for redetermination consistent with the opinions of this Court, and the Constitution of the United States.

Respectfully Submitted:

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
COURT OF APPEAL
SEP 23, 1998
CHARLES R. FULBRUGE III

No. 90-40112

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GORDON NDUSI OKOILI,

Defendant -Appellant.

Appeal, from the United States District Court for the Eastern District of Texas

USDC No. 6:95-CR - 33-ALL

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER. CURIAM:

Gordon Okoli appeals his conviction for possession with the intent to distribute cocaine. He argues that the district court erred in denying his motion to suppress evidence seized after a traffic stop, in denying a continuance due to his absence from the trial, and in instructing the jury.

We have reviewed the record and the briefs of the parties and find no reversible error. Accordingly, we AFFIRM.. See United States v.

Okoli, No. 6 :95CR00033-001 (E.D. Tex.., Jan. 21, 1998).

AFFIRMED.

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH.CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

F I L E D
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
October 25, 1996
David J. Maland, Clerk
/s/ Deputy

UNITED STATES OF AMERICA	§	
V.	§	6:95 CR 33
GORDON NDUBISI OKOLI	§	

VERDICT OF THE JURY

We, the Jury, find as to Count I of the Indictment:

Gordon Ndubisi Okoli _X_ GUILTY _____ NOT GUILTY

/s/Jury Foreperson

DATE: 10-25-95

APPENDIX C

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
AMENDMENT IV--SEARCHES AND SEIZURES

Current through P.L. 105-216, approved 7-29-98

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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APPENDIX D

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CRIMINAL
PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
X. GENERAL PROVISIONS

Amendments received to 8-21-98

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contenders,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial,

(2) in a noncapital case, is voluntarily absent the imposition of sentence, or

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Presence Not Required. A defendant need not be present:

(1) when represented by counsel and the defendant is an

organization, as defined in 18 U.S.C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a correction of sentence under Rule 35.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TYLER DIVISION

FILED
U.S. District Court
Eastern District of Texas
October 13, 1995
David J. Maland, Clerk
/s/deputy

United States of America	§	
V.	§	**6:95 CR 33**
Gordon Ndubisi Okoli	§	

ORDER

Defendant Gordon Ndubisi Okoli is charged by Grand Jury Indictment with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). Defendant moves to suppress evidence on the grounds he was detained, searched, and arrested without warrant or probable cause while driving in Panola County. An evidentiary hearing on the suppression motion was held on October 11, 1995. Having considered the motion, evidence presented at the hearing, and arguments of counsel, the court finds that Defendant's motion to suppress evidence should be denied.

In accordance with this order, the court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

On June 27, 1995, Department of Public Safety Trooper Barry Washington observed a gray Mercury Topaz travel very close to his parked patrol unit and thereafter move onto the improved shoulder twice. Because the Mercury twice traveled over the white line marking the lane, Trooper Washington suspected that the driver might be under the influence of alcohol or medication. Trooper Washington proceeded to stop the vehicle for moving onto the improved shoulder and failure to maintain a single marked lane.

When he approached the vehicle, Trooper Washington noticed that the driver had rolled down the driver's window, the front passenger window, and the right rear passenger window. The windows were not down when the vehicle first passed Trooper Washington's patrol unit. He identified the driver as Gordon Ndubisi Okoli and requested him to step out of the car with his license and insurance papers. Trooper- -Washington waited to the -rear of the vehicle; the driver never came to the rear of the car. Trooper Washington returned to the driver's door and again requested Okoli to step out, and inquired as to whether he was tired or sleepy, or under the influence of medication **or** alcohol. Okoli advised there was nothing wrong with him. Trooper Washington returned to the rear of the Mercury where he proceeded to write a warning ticket. Okoli did exit his vehicle and gave Trooper Washington his driver's license and insurance papers. While waiting at the rear of the Mercury, Trooper Washington smelled a strong odor of dryer sheets. He then questioned Okoli about his destination.

Okoli stated that he was traveling to Texarkana to see a friend named John who lived by the freeway. Okoli did not know John's address, telephone number, or last name, but stated that he would get in touch with him somehow.

On the back seat of the car were a Houston Rockets t-shirt and

jeans. Okoli said that he was taking the t-shirt to his friend John, and that his clothes were in the trunk. Trooper Washington asked Okoli if he could see his clothes in the trunk. Okoli said yes, removed the keys from the ignition, and opened the trunk. The trunk contained a black tote bag with clothing inside, motor oil cans, and a spare tire. Trooper Washington saw a piece of plastic sandwich wrap in the trunk, and Okoli became flustered when Washington inquired about it. Trooper Washington had previously seen contraband wrapped in plastic sandwich wrap.

Trooper Washington next requested permission to open the right rear door, and Okoli consented. At the right rear passenger door Trooper Washington again smelled the strong dryer sheet odor, observed that the top portion of the doorlock button had been broken off, and observed that the space in the door for the window appeared wider than it should have been. The dryer sheet odor seemed to becoming from the door. Trooper Washington took a pen from his shirt pocket and placed it inside the door panel in order to see down into the door. The door panel moved easily. He observed what appeared to be a clear plastic wrapped package inside the door. Trooper Washington suspected that the package contained marijuana because of the dryer sheet odor, which in his experience has been used by many to mask the odor of contraband.

Trooper Washington handcuffed Okoli and indicated that he believed that there was marijuana inside the door which Okoli denied. Trooper Washington said that if it was not marijuana, it was some other kind of contraband and the dryer sheets had been used to mask the odor. Okoli again denied the presence of contraband.

Trooper Washington requested the assistance of Panola County Sheriff's Lieutenant Ronnie LaGrone and his narcotics detecting canine. When LaGrone arrived, his dog alerted on the right rear door. LaGrone and Washington disassembled the door. The door contained five

cellophane wrapped packages of a white powdery substance, each of which appeared to be a kilogram of cocaine. Newspaper was also present in the door panel. Okoli was then arrested and read his Miranda warnings. A field test was later performed at LaGrone's office which confirmed that the contents of the five packages were cocaine. Each package of cocaine was wrapped in plastic, then wrapped in three dryer sheets, and further wrapped with eight to ten feet of saran wrap or similar type plastic wrap.

Prior to the suppression hearing, Okoli moved to conduct a scientific experiment to test Trooper Washington's ability to smell dryer sheets. The court granted Okoli's motion. At the suppression hearing counsel for Okoli advised that he would like to conduct the test at the beginning of the cross examination of Trooper Washington. The government objected because the proper foundation and qualifications for the expert as well as the relevance of the test had not been established. The court ruled that the test would not begin until the very end of the suppression hearing. Trooper Washington was cross examined and then left the courtroom until he was to reappear to take part in the test. At the close of the government's and defendant's evidence, the court took up the matter of the scientific experiment. A chemist testified regarding the test and its relevance; six open paper sacks containing various items covered by newspaper..were placed throughout the courtroom. Trooper Washington would be asked to move as close to the bags as he did to the right rear door panel and to iiiform the court whether any contained dryer sheets. The court ordered a side bar so that counsel for Okoli could reveal the contents of the paper sacks to the court and counsel for the government. It was revealed that none of the bags contained dryer sheets.

Trooper Washington returned to the courtroom and was told to move toward the six paper sacks and determine whether any contained dryer sheets. Trooper Washington maintained a distance of one to two feet

from each bag, sniffed, and returned to the witness stand. Upon being asked which bags contained dryer sheets, Trooper Washington indicated that it was hard to tell because there was a strong odor of dryer sheets at the witness stand, where no paper bags were placed. The court inquired whether Trooper Washington brought dryer sheets with him. Trooper Washington replied that he had not, but that there were dryer sheets somewhere at the witness stand. Trooper Washington then responded that none of the bags contained dryer sheets. Immediately it was revealed that counsel for Okoli had placed a piece of cardboard wrapped with three dryer sheets, further wrapped by saran wrap under the seat in the witness stand. This occurred about 8:30 a.m. the morning of the hearing outside the presence of court personnel and was never revealed to the court or counsel for the government. - Despite counsel for Okoli's attempt at trickery, Trooper Washington passed with flying colors.[1] The actions of counsel for Okoli justify the imposition of sanctions. Although the court holds such conduct in great disdain, it will not impose sanctions this time. However, counsel is admonished that such actions will not be so

---

[1] Counsel for Okoli makes much of the fact that immediately after the court ordered that the experiment would not be conducted until the end of the suppression hearing, counsel asked Trooper Washington whether he smelled dryer sheets. Trooper Washington responded on cross examination that he did not. Then cross examination continued. Although it was later revealed that dryer sheets were present when Trooper Washington first responded that he did not smell dryer sheets, the court does not consider Trooper Washington's response to contradict his assertion that he smelled dryer slicers on June 27, 1995. The test was not to be conducted until the end of the suppression hearing after proper foundation and qualifications had been established. Once the test commenced, Trooper Washington performed remarkably despite counsel for Okoli's ruse.

generously handled in the future.

II CONCLUSIONS AND ANALYSIS.

A. Traffic Stop

A short investigatory detention is permitted if an officer has "a **reasonable articulable suspicion of criminal activity.**" *Terry v. Ohio,* 392 U.S. 1 (1986). Courts must consider the totality of the circumstances when determining if an investigatory stop of a vehicle is justified. *United States v. Cortez,* 449 U.S. 41 1, 417-418 (1981). The Supreme Court and the Fifth Circuit have used *Terry* to analyze cases in which motorists were stopped for violating traffic laws. *United States v. Shabazz,* 993 F.2d 431, 435 (5th Cir. 1993). Okoli's vehicle moved onto the shoulder two times. Failure to maintain a single marked lane is a violation of. the traffic laws of the State of Texas. Tex. Rev. Civ. Stat. Ann. art. 6701d § 60(a) (Vernon 1977). Additionally, a driver may operate a vehicle on an improved shoulder only uiider limited circumstances, none of which apply here. *See* Tex. Rev. Civ. Stat. Ann. art. 6701d § 54A (Vernon Supp. 1995). Trooper Washington also suspected the driver might be under the influence of alcohol or medication. Okoli argues that he did not violate any traffic law because failure to maintain a single marked lane is a violation only if the driver does not "first ascertain that such movement could be made with safety." There was no testimony that Okoli's movement could not be made with safety. Assuming that Okoli did not violate the law regarding traveling in a singled marked lane, it appears that Okoli did violate the law regarding driving on an improved shoulder. *See* Tex. Rev. Civ. Stat. Ann. art. 6701d § 54A (Vernon Supp. 1995). Trooper Washington explained that one cannot drive on the shoulder of a road whenever one wants to; that there needs to be an emergency. Although §54A indicates other instances besides emergencies when it would be proper to drive on the improved shoulder, none of those apply to Okoli. Additionally,

Trooper Washington suspected that Okoli might be driving while under the influence of alcohol. Under these circumstances, the stop of the vehicle was proper. The fact that Okoli's warning ticket was written for a violation of "failure to drive in a single lane" does not prove that Okoli obeyed all other traffic laws. It only proves that Trooper Washington wrote a warning ticket for only one violation.

Okoli's argument that Trooper- Washington's stop was pretextual is unavailing. *United States v. Causey,* 834 F.2d 1179 (5th Cir. 1987) (en banc), forecloses this avenue of inquiry as long as the traffic stop was objectively authorized. *See United States v. Shabazz,* 993 F.3d at 435 n.3; *United States v. Kelley,* 981 F.2d 1464, 1467 (5th Cir.), *cert. denied,* 113 S. Ct. 2427 (1993). The court finds that the stop was lawful under the Fourth Amendment and *Terry* and its progeny.

A valid investigatory detention must be reasonable in scope and conducted for a legitimate investigatory purpose. The range of police activities pen-nitted during an investigatory detention must be reasonably related to the circumstances that initially justified the detention. *United States v. Sharpe,* 470 U.S. 675 (1985). The duration of the stop was approximately forty minutes. This is not an excessive amount of time. The questions Trooper Washington asked and the request that Okoli step out of the vehicle was reasonable in light of the suspicion that Okoli might have been intoxicated or under the influence of drugs when he moved onto the shoulder of the road twice. The court finds the detention of Okoli was all,,o reasonable under the Fourth Amendment.

B. Search of the Vehicle

The government advances two exceptions to the search warrant requirement of the Fourth Amendment. First the government argues that Okoli consented both to the search of the trunk and the search of the right

rear door. A search based upon consent may be undertaken by governinent actors without a warrant or probable cause and any evidence discovered during the search may be seized and admitted at trial. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973); *United States v. Shabazz,* 993 F.2d 431, 438-39 (5th Cir. 1993). Where the validity of a search rests on consent, the government has the burden of proving that the necessary consent was obtained. *United States v. Ponce,* 8 F.3d 989, 997 (5th Cir. 1993). The court finds that the Okoli consented to the search of the trunk. However, the court finds that Okoli did not consent to the search of the car. Okoli merely consented to the right rear door being opened so that he could show Trooper Washington the t-shirt and jeans. Therefore the search of the interior of the car and the seizure of the contraband must be supported by probable cause.

An automobile may be searched without a warrant if there is probable cause. *United States v. Ross,* 456 U.S. 798 (1982). The government argues that Trooper Washington had probable cause to search the vehicle based on Okoli's story about his destination, the dryer sheet odor, and Okoli's reaction when Trooper Washington saw the piece of plastic cellophane in the trunk. To determine whether probable cause exists, the court must look to the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213, 230 (1983). Probable cause means "a fair probability that contraband or evidence of a crime will be found." Id. at 238. The court concludes that many factors support a finding of probable cause to search. Not only did Okoli give insufficient answers regarding his destination, but Okoli also became nervous when questioned about the plastic bag found in his trunk. Trooper Washington noticed that the top portion of the right rear doorlock was broken and that the space between the right rear door panel and the right rear window was larger than normal. Trooper Washington also smelled dryer sheets, which he knows through

his vast experience to be commonly used to mask the odor of contraband. Additionally, a narcotics detecting canine alerted to the lower portion of the right rear door. Ample evidence exists to show that Trooper Washington had probable cause to search Okoli's vehicle.

"Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a reasonable person to believe that an offense has been committed or is being committed." *United States v. Antone,* 753 F.2d 13015 1304 (5th Cir.), *cert. denied,* 474 U.S. 818 (1985). Because the search of the vehicle revealed contraband, certainly there existed probable cause to arrest.

Therefore, it is ORDERED that Defendant's Motion to Suppress is DENIED.

SIGNED this 13th day October, 1995.

/s/ John Hannah, Jr.

United States District Judge

APPENDIX F

TIME. DOES ANYONE HAVE ANYTHING ELSE TO BRING UP AT THIS TIME?

MR. RIVERS: YOUR HONOR, AT THE SIDE BAR AT THE OUTSET OF TESTIMONY I HAD REQUESTED THE COURT TO MAKE FINDINGS IN THE RECORD CONCERNING THE VOLUNTARINESS OF MR. OKOLI'S ABSENCE FROM COURT, AS WELL AS TO CONDUCT THE BALANCING TEST THAT I THINK THE FIFTH CIRCUIT REQUIRES AS A MATTER OF RECORD, IN THE EVENT OF A CONVICTION AND APPEAL IN THIS MATTER.

THE COURT: WELL, HOW DO YOU SUGGEST WE PROCEED ON THAT? I HAVE MADE AN INQUIRY THIS MORNING. I'LL MAKE ANOTHER INQUIRY NOW OF THE DEFENDANT'S LAWYER. MR. FRY, DO YOU KNOW OF ANY REASON WHATSOEVER THAT YOUR CLIENT IS NOT HERE?

MR. FRY: YOUR HONOR, I HAVE NOT HEARD FROM MR. OKOLI TODAY. I EXPECTED HIM TO BE HERE WHEN I LAST TALKED TO HIM ON THURSDAY. I KNOW OF NO REASON HE WOULD BE MISSING,

PERIOD.

MR. RIVERS: YOUR HONOR, AS WELL, I AM INFORMED HAVE SEEN TWO GENTLEMEN OUTSIDE WHO HAVE BEEN REPRESENTED TO
BE THE BROTHERS OF MR. OKOLI, ONE OF WHOM IS
MR. OLIVER OKOLI . OLIVER OKOLI IS ON THE CONDITIONS OF RELEASE IN THIS CASE
AS HAVING AGREED TO THE COURT: IS MR. OKOLI OUT THERE NOW?

MR. RIVERS: HE IS, YOUR HONOR.

THE COURT: ALL RIGHT. BRING MR -- HAVE THE MARSHAL
BRING MR. OKOLI IN.
DEPUTY MARSHAL: WHAT'S HIS FIRST NAME?

MR. FRY: OLIVER.

MR. RIVERS: OLIVER. DOES THE COURT WISH TO CONDUCT THE
INTERROGATION OR WISH COUNSEL TO CONDUCT THE
INTERROGATION, YOUR HONOR?

THE COURT: WE'LL BOTH PROBABLY DO IT.
MR. OKOLI, IF YOU WILL COME UP HERE, PLEASE, SIR. IF YOU'LL COME UP HERE BEFORE THE COURTROOM DEPUTY AND RAISE YOUR
RIGHT HAND AND BE SWORN IN.

(WITNESS SWORN.

THE COURT: PLEASE BE SEATED OVER IN THE WITNESS STAND. I CAN GET THE MARSHAL TO TAKE SOME OF THAT STUFF OFF
THE STAND. THAT WILL BE GOOD ENOUGH.

WHY DON'T YOU PROCEED AND THEN WE'LL HAVE THE ATTORNEY FOR THE DEFENDANT TELL US OR GIVE HIM AN OPPORTUNITY TO ASK SOME QUESTIONS.

MR. RIVERS: THANK YOU, YOUR HONOR.

OLIVER OKOLI, GOVERNMENT'S WITNESS, SWORN

(OUTSIDE THE PRESENCE OF THE JURY)

DIRECTEXAMINATION

BY MR. RIVERS:

Q WOULD YOU STATE YOUR NAME FOR THE RECORD, PLEASE, SIR?

A OLIVER EMEKA OKOLI.

Q COULD YOU SPELL THAT FOR THE BENEFIT OF THE COURT REPORTER, PLEASE, SIR?

A. O-L-I-V-E-R E-M-E-K-A O-K-O-L-I.

Q THANK YOU, SIR. AND WHERE DO YOU RESIDE, MR. OKOLI?

A HOUSTON, TEXAS.

Q AND WERE YOU PRESENT HERE IN COURT IN TYLER, TEXAS ON JUNE THE 30TH OF THIS YEAR WHEN YOUR BROTHER APPEARED BEFORE UNITED STATES MAGISTRATE JUDGE JUDITH GUTHRIE?

A YES.

Q. AND AT THAT TIME, SIR, I BELIEVE THAT MAGISTRATE JUDGE GUTHRIE PLACED HIM UNDER CONDITIONS OF RELEASE, IS THAT CORRECT, SIR?

A YES.

Q AND AS ONE OF THE CONDITIONS OF THAT RELEASE OF

YOUR BROTHER -- AND YOU UNDERSTAND HE WAS CHARGED WITH POSSESSION WITH INTENT TO DISTRIBUTE COCAINE, IS THAT CORRECT, SIR?

A YES.

Q AND THAT IS THE CHARGE FOR WHICH HE'S SUPPOSED TO BE HERE ON TRIAL TODAY?

A YES.

Q MR. OKOLI, AT THAT HEARING YOU DID, DID YOU NOT, SIR, AGREE TO ASSUME CUSTODY OF YOUR BR T

A YES.

Q AND RAS HE RESIDED WITH YOU IN HOUSTON SINCE YOU ASSUMED THAT CUSTODY?

A. YES.

Q MR. OKOLI, FOR PURPOSES OF THE RECORD, I WOULD LIKE TO SHOW YOU A DOCUMENT ENTITLED ORDER SETTING CONDITIONS OF 1 RELEASE, WHICH I HAVE MARKED FOR IDENTIFICATION PURPOSES HERE GOVERNMENT'S EXHIBIT 20, AND ASK YOU TO EXAMINE THAT AND ON THE PAGE UNDER ADDITIONAL CONDITIONS OF RELEASE, IS THAT YOUR SIGNATURE?

A YES.

Q AND THAT IS AGREEING TO ACCEPT CUSTODY OF YOUR BROTHER, IS IT NOT, SIR?

A YES.

Q MR. OKOLI, WHEN IS THE LAST TIME YOU SAW YOUR

BROTHER?

A I SAW MY BROTHER SATURDAY.

Q SATURDAY, OCTOBER THE 21ST?

A THIS PAST SATURDAY.

Q THIS IMMEDIATE PAST SATURDAY, IS THAT CORRECT, SIR?

A YES.

Q AND WHERE WERE YOU WHEN YOU SAW YOUR BROTHER?

A HE CAME TO MY PLACE.

THE COURT: THAT WOULD BE OCTOBER THE 21ST, SATURDAY, OCTOBER THE 21ST, IS THAT CORRECT?

Q IS THAT CORRECT, SIR?

A YES.

Q AND HE CAME TO YOUR PLACE. DO I ASSUME BY THAT HE HAS NOT ACTUALLY BEEN PHYSICALLY RESIDING WITH YOU IN HOUSTON?

A HE -- NOT PHYSICALLY RESIDING WITH ME IN HOUSTON.

WHERE DOES HE LIVE IN RELATION TO WHERE YOU LIVE? HOW FAR APART ARE YOU?

A ABOUT 30 MILES.

Q HOW FREQUENTLY DO YOU SEE YOUR BROTHER?

A TWICE A WEEK.

Q NOW, YOU HAVE TESTIFIED TO THE COURT THAT THE LAST TIME YOU SAW YOUR BROTHER HE CAME TO YOUR HOUSE ON THIS

PAST
SATURDAY, OCTOBER THE 21ST, 1995, IS THAT CORRECT, SIR?
A YES.
Q AND WHAT, IF ANYTHING, DID HE TELL YOU THEN ABOUT -- AND
THAT WAS AFTER THE SELECTION OF THIS JURY, IS THAT CORRECT?
A YES.
Q HAD YOU SEEN HIM AFTER THIS JURY WAS PICKED IN THIS CASE?
A COULD YOU REPEAT THE --
Q DID YOU SEE HIM AFTER THE JURY SELECTION IN THIS CASE?
A YES.
Q AND WERE YOU AWARE THAT A JURY HAD IN FACT BEEN PICKED FOR
YOUR BROTHER'S TRIAL?
A YES.
Q AND WAS YOUR BROTHER AWARE OF THAT?
A YES.
Q WAS HE AWARE THAT HE NEEDED TO BE HERE IN THE COURTROOM
TODAY FOR HIS TRIAL?
A TO THE BEST OF MY RECOLLECTION.
Q THAT'S A YES?
A YES
Q MR. OKOLI, WHEN YOUR BROTHER CAME TO YOUR HOUSE LAST
SATURDAY, OCTOBER THE 21ST, DID HE TELL YOU WHERE, IF

ANYWHERE, HE WAS GOING TO GO?
A HE DID NOT TELL ME.
Q DID YOU BECOME AWARE EITHER THEN OR LATER THAT YOUR
BROTHER INTENDED TO GO SOMEWHERE?
A I WAS AWARE OF THAT ON MONDAY.
Q MONDAY OF THIS WEEK?
A OF THIS WEEK.
Q THAT WOULD BE MONDAY, OCTOBER THE 23RD, 1995?
A YES.
Q HOW DID YOU BECOME AWARE OF THAT?
A THROUGH MY OTHER BROTHER, LARRY.
Q AND IS HE HERE ALSO OUTSIDE THE COURTROOM?
A YES.
Q WHAT DID YOUR BROTHER LARRY TELL YOU ABOUT WHETHER OR NOT
YOUR BROTHER WAS GOING TO GO SOMEWHERE?
A THAT HE WAS GOING TO GO TO MEMPHIS TO PICK UP AN ASSOCIATE
OF HIS AND THEN THAT HE WAS GOING TO PROCEED FROM MEMPHIS TO
HERE TODAY.
Q NOW, YOUR BROTHER DIDN'T TELL YOU THAT?
A HE DID NOT TELL ME THAT.
Q AND YOU'RE THE ONE WHO HAS CUSTODY, ACCORDING TO THE COURT
ORDER. OF YOUR BROTHER, IS THAT CORRECT?
A YES.
Q ONCE YOU BECAME AWARE THAT YOUR BROTHER

INTENDED TO TRAVEL
TO MEMPHIS, DID YOU CONTACT THE PROBATION DEPARTMENT, WHO IS
SUPERVISING YOUR BROTHER?
A I CONTACTED THE -- HIS ATTORNEY'S OFFICE.
Q I KNOW THAT, SIR, BUT DID YOU CONTACT EITHER THE COURT OR
THE PROBATION OFFICER TO TELL THEM YOUR BROTHER WOULD BE
TRAVELING OUTSIDE OF THE SOUTHERN AND EASTERN DISTRICTS OF
TEXAS?
A NO.
Q AND ARE YOU AWARE THAT ACCORDING TO THESE CONDITIONS OF
RELEASE HE IS NOT TO LEAVE EITHER OF THOSE TWO JUDICIAL
DISTRICTS WITHOUT PERMISSION OF THE COURT?
A YES.
Q SO YOU DID NOT IN FACT NOTIFY THE COURT OF THE FACT THAT
HE INTENDED TO TRAVEL, IS THAT CORRECT, SIR?
A I DID NOT.
Q AND IT WAS NOT YOUR BROTHER GORDON, THE DEFENDANT IN THIS
CASE, WHO TOLD YOU THAT HE WAS GOING TO GO TO MEMPHIS. IT WAS
IN FACT YOUR OTHER BROTHER LARRY, IS THAT CORRECT?
A YES.

Q DID YOU, SIR, EVER HAVE A CONVERSATION WITH YOUR BROTHER GORDON CONCERNING HIS INTENDED TRAVEL TO MEMPHIS, TENNESSEE?

A. NO.

Q DO YOU KNOW THE NAME OF THE ASSOCIATE OF YOUR BROTHER IN MEMPHIS, TENNESSEE?

A HE SAID IT WAS -- WELL, HE DIDN'T TELL ME LIKE I SAID, BUT MY BROTHER LARRY TOLD ME IT WAS OKEKE.

Q AND IS THAT A PERSON WHO IS KNOWN TO YOU?

A NO.

Q NOW, YOUR BROTHER IS NOT A CITIZEN OF THE UNITED STATES, IS THAT CORRECT?

A YES.

Q YES, HE IS NOT A CITIZEN?

A HE'S NOT A CITIZEN.

THE COURT: THERE'S FINALLY SOME PERSON THAT ANSWERED THAT QUESTION EXACTLY INSTEAD OF OPPOSITE AND IT CONFUSED YOU.

MR. RIVERS: I ACCEPT RESPONSIBILITY FOR THE INARTFULLY POSED QUESTION, YOUR HONOR.

THE COURT: WELL, ALL THOSE QUESTIONS, HALF OF THEM ON THE RECORD HAVE THE WRONG ANSWERS. TECHNICALLY WE ALL TAKE

SOMETHING -- I FINALLY HAD A WITNESS THAT ANSWERED SOMETHING
EXACTLY THE WAY THE QUESTION WAS ASKED AND IT CONFUSED THE
QUESTIONER.
BY MR. RIVERS:
Q DID HE, SIR, SURRENDER HIS PASSPORT TO THE COURT?
A HE DID.
Q TO YOUR KNOWLEDGE HAS FIE OBTAINED ANOTHER PASSPORT?
A NO.
Q NOW, YOU CONTACTED MR, L-RY'S OFFICE ON MONDAY, IS THAT
CORRECT?
A YES -
Q AND THIS WAS FOLLOWING YOUR BROTHER LARRY'S INFORMATION
THAT YOUR BROTHER WAS GOING TO TRAVEL?
A NO. IT WAS BEFORE THEN.
Q ONCE YOU BECAME AWARE THROUGH YOUR BROTHER LARRY THAT YOUR
BROTHER INTENDED TO GO TO MEMPHIS, YOUR BROTHER GORDON, DID
YOU CONTACT MR. FRY?
A I DID.
Q DID YOU TELL HIM THAT YOUR BROTHER WAS GOING TO MEMPHIS?
A I WASN'T -- I HAD TALKED TO MR. FRY I THINK EITHER MONDAY

OR TUESDAY ABOUT THAT, RIGHT.

Q DID YOU BECOME, SIR, CONCERNED THAT YOUR BROTHER HAD NOT RETURNED FROM MEMPHIS?

A WHEN -- I WAS UNDER THE IMPRESSION AND I WAS CONVINCED THAT HE WAS GOING TO BE HERE. WHEN I GOT HERE I CALLED MY MOTHER AND ASKED MY MOTHER IF SHE HAD HEARD FROM GORDON.

Q AND WHAT WAS HER RESPONSE?

A AND SHE SAID SHE HAD NOT HEARD FROM GORDON.

Q AND HAVE YOU HEARD FROM YOUR BROTHER, BY TELEPHONE OR OTHERWISE, SINCE SATURDAY, THE 21ST?

A I HAVE NOT.

Q HOW WAS YOUR BROTHER PLANNING TO TRAVEL TO MEMPHIS?

A I DO NOT KNOW.

Q AND DO YOU KNOW WHETHER OR NOT YOUR BROTHER KNOWS?

A THE SECONDHAND INFORMATION THAT I GOT WAS THAT HE MAY HAVE FLOWN TO MEMPHIS.

MR. RIVERS: YOUR HONOR I BELIEVE THAT'S ALL THE QUESTIONS WE HAVE OF THIS WITNESS AT THIS TIME.

THE COURT: MR. FRY, DO YOU HAVE ANY QUESTIONS?

MR. FRY: YES, YOUR HONOR.

CROSS EXAMINATION

BY MR. FRY:
Q THE INFORMATION YOU HAD FROM YOUR BROTHER WAS THAT HE WAS
GOING TO TRY TO SECURE THE ATTENDANCE OF A POTENTIAL WITNESS
AT THIS TRIAL THAT RESIDED IN MEMPHIS?
A YES.
Q AND YOUR INFORMATION FROM LARRY WAS THAT HE WAS GOING TO
GO TO MEMPHIS AND THEN COME STRAIGHT TO THIS TRIAL?
A YES.
Q AND YOU HAD NO KNOWLEDGE THAT HE WAS GOING TO DO OTHER
THAN COME TO THIS TRIAL?
A. I WAS EXPECTING TO SEE HIM HERE.
Q HE HAS NEVER INDICATED TO YOU IN ANY WAY THAT HE WOULD NOT
ATTEND THE TRIAL?
A THERE WAS NO INDICATION AT ALL.
Q IN FACT, THIS MORNING W HEN YOU WERE HERE YOU EXPECTED HIM
TO BE HERE BY THE TIME YOU GOT HERE, DIDN'T YOU?
A THAT'S THE FIRST THING I ASKED YOU.
Q AND HE NEVER CONSULTED YOU BEFORE HE LEFT TO GO TO
MEMPHIS, DID HE?
A HE DIDN'T.
Q AND YOU HAD NO KNOWLEDGE EVEN IF HE TALKED TO ME BEFORE HE

WENT TO MEMPHIS?

A I DON'T HAVE ANY KNOWLEDGE.

Q SO HE DIDN'T CLEAR IT WITH YOU OR I WHETHER HE COULD GO TO MEMPHIS?

A TO THE BEST OF MY UNDERSTANDING.

MR. FRY: NOTHING FURTHER.

THE COURT: I HAVE A QUESTION FOR YOU, MR. FRY.

MR. FRY: YES, SIR.

THE COURT: DO YOU HAVE A POTENTIAL WITNESS IN MEMPHIS?

MR. FRY: YES, YOUR HONOR.

THE COURT: HOW WERE YOU GOING TO GET HIM HERE?

MR. FRY: UP TO THIS TIME WE WERE NOT ABLE TO LOCATE HIM. I DID NOT ASK GORDON OKOLI TO GO THERE TO TRY TO LOCATE HIM. WE WERE NOT ABLE TO LOCATE THE WITNESS. WE WERE NOT GOING TO HAVE A WITNESS COME IN FROM MEMPHIS BECAUSE WE WERE NOT ABLE TO LOCATE HIM.

THE COURT: BUT YOU HAD REACHED THAT DETERMINATION I')2 WITH MR. OKOLI?

MR. FRY: I'M SORRY?

THE COURT: I ASSUME -- YOU TOLD ME THAT YOU TALKED TO MR. OKOLI THE LAST TIME THURSDAY.

MR. FRY: TALKED TO HIM LAST TIME THURSDAY. WE

TALKED FOR TWO OR THREE HOURS. IT WAS MY INTENTION TO PUT HIM
ON THE WITNESS STAND TO TESTIFY. WE WENT OVER HIS TESTIMONY
AT LENGTH, THREE HOURS. THERE WAS NO INDICATION THAT HE WAS GOING TO MEMPHIS. I DID NOT SUGGEST THAT HE GO TO MEMPHIS. I
THOUGHT HE WAS GOING TO COME IN HERE AND BE HERE AT THE TRIAL
AND DRIVE FROM HOUSTON.

THE COURT: WELL, WERE YOU AWARE -- CAN YOU GIVE US
ANY REASON THAT YOU HAVE ANY FACTUAL BASIS FOR HIM NOT
BEING HERE AT THIS PARTICULAR TIME OTHER THAN HIM VOLUNTARILY
MAKING HIMSELF ABSENT FROM TRIAL?

MR. FRY: I HAVE NO REASON -- I HAVE NO IDEA WHY HE
IS NOT HERE, YOUR HONOR, PERIOD.

THE COURT: ALL RIGHT. THANK YOU.

MR. OKOLI, WHAT IS THE STATUS OF YOUR BROTHER'S RESIDENCE
IN THIS COUNTRY? WHAT TYPE OF --

A HE HAS BEEN APPROVED FOR PERMANENT RESIDENCE AND IS
AWAITING FOR THE GREEN CARD.

THE COURT: WHEN WAS HE EXPECTING TO GET THAT?

A. PROBABLY IN ABOUT A COUPLE OF MONTHS.

THE COURT: YOU STILL HAVE RELATIVES AND FAMILY IN
NIGERIA? IS THAT YOUR HOME COUNTRY?
A YES, YOUR HONOR.
THE COURT: YOU HAVE EXTENDED RESIDENCE AND FAMILY
IN NIGERIA.
A YES.
THE COURT: A-RE YOUR PARENTS THERE?
A MY MOTHER IS HERE AND MY FATHER IS OVER THERE.
THE COURT: I ASSUME YOU HAVE AUNTS, UNCLES AND OTHER RELATIVES THERE TOO.
A MY UNCLES AND AUNTS, YES.
THE COURT: LET ME ASK YOU THIS QUESTION, MR. OKOLI,
THE ONE I ASKED THE ATTORNEY. CAN YOU GIVE US ANY REASON THAT
YOUR BROTHER IS NOT HERE TODAY THAT YOU ARE AWARE OF OTHER
THAN HIM MAKING THE DECISION TO NOT BE HERE?
A TO THE BEST OF MY KNOWLEDGE, I CAN'T TELL, BUT HE TALKED
ABOUT THE WITNESS IN MEMPHIS AND TALKED ALSO ABOUT HOW
IMPORTANT IT WAS THAT HE HAD THE WITNESS HERE TO HELP HIS
CASE.
THE COURT: WHEN WAS THE LAST TIME ANY MEMBER, YOU

OR YOUR FAMILY -- HAVE YOU OR ANY MEMBER OF YOUR FAMILY HEARD
FROM MR. GORDON OKOLI?
A THE LAST TIME THAT I -- HE TALKED TO ME WAS MONDAY
MORNING. HE CALLED ME AT WORK.
THE COURT: THIS LAST MONDAY?
A THIS LAST MONDAY IN THE MORNING, AND HE WANTED TO KNOW IF
I WAS GOING TO BE ABLE TO GET SOME PERMISSION TO BE HERE
TODAY, AND I TOLD HIM THAT I ALREADY TALKED TO THE SUPERVISOR,
THAT I WAS GOING TO BE HERE.
THE COURT: AND DID ANY OTHER MEMBER OF YOUR FAMILY
HEAR FROM HIM SINCE THEN?
A NOBODY HAS HEARD FROM HIM SINCE THEN.
THE COURT: WHEN YOU -- YOU MENTIONED SOMETHING
ABOUT YOUR MOTHER HEARING FROM HIM. I THINK -- DID YOU SAY
SHE TALKED TO HIM LAST SATURDAY?
A NO, NOT MY MOTHER.
THE COURT: WHO WAS THAT?
A IT WAS MY BROTHER.
THE COURT: YOUR BROTHER?
A YEAH, LARRY.
THE COURT: AND IS YOUR MOTHER -- YOU TOLD ME

YOUR
MOTHER IS HERE?
A NO. I HAD CALLED MY MOTHER. I DON'T KNOW THE LAST TIME
MY MOTHER SAW HIM, BUT WHEN I CAME OVER HERE TODAY I CALLED MY
MOTHER TO SEE IF THEY HAVE HEARD FROM GORDON.
THE COURT: AND WHEN DID SHE SAY SHE HEARD FROM HIM
LAST, OR DID SHE?
A I DIDN'T -- YOU KNOW, I WASN'T SPECIFIC. I JUST ASKED HAD
GORDON CALLED. BUT TO THE BEST OF MY KNOWLEDGE, UP UNTIL
PROBABLY YESTERDAY, NOBODY HAS HEARD FROM GORDON.
THE COURT: IS MR. OKOLI AWARE THAT IF HE WAS
CONVICTED OF THIS OFFENSE, THAT AFTER HE SERVED A PENITENTIARY
TIME, IF HE DID SERVE PENITENTIARY TIME, THAT HE WOULD MORE
THAN LIKELY BE DEPORTED?

A I'M NOT AWARE OF THAT, IF HE KNOWS THAT.
THE COURT: OKAY. ANY OTHER QUESTIONS, GENTLEMEN?
MR. RIVERS: NOT OF THIS WITNESS, YOUR HONOR.
THE COURT: ALL RIGHT. YOU CAN STEP DOWN, MR. OKOLI. THANK YOU.
MR. RIVERS: YOUR HONOR, SINCE MR. LARRY OKOLI IS

ALSO PRESENT I THINK WE SHOULD HEAR FROM HIM AS WELL.

THE COURT: ALL RIGHT.

MR. RIVERS: ALSO, MS. CLAYTON WITH THE PRETRIAL SERVICES SECTION OF THE PROBATION DEPARTMENT IS AVAILABLE TO
TESTIFY THAT MR. GORDON OKOLI DID NOT SEEK TRAVEL PERMISSION
FROM SUPERVISING PROBATION OFFICERS, AND WE COULD REQUEST THAT
SHE BE ASKED TO COME DOWN IF THE COURT WOULD LIKE TO HAVE HER
ON THE RECORD.

THE COURT: I DON'T THINK THAT'S NECESSARY. I'M GOING TO MAKE THE LETTER THAT SHE WROTE YOU A PART OF THE
FILE, WHICH SETS THAT OUT. DO YOU HAVE AN EXTRA COPY OF IT ON
YOU?

MR. RIVERS: YES, SIR, I BELIEVE SHE GAVE US ONE.

THE COURT: SHOW IT TO MR. FRY.
MR. OKOLI, IF YOU WI LL STEP UP HERE, PLEASE, SIR. RAISE YOUR RIGHT HAND AND BE SWORN BY THE DEPUTY.

(WITNESS SWORN.

THE COURT: IF YOU WILL BE SEATED OVER THERE.

MR. RIVERS: MAY I PROCEED, YOUR HONOR?

THE COURT: YES.

LARRY OKOLI, GOVERNMENT'S WITNESS, SWORN

(OUTSIDE THE PRESENCE OF THE JURY)

DIRECTEXAMINATION

BY MR. RIVERS:

Q WOULD YOU STATE YOUR NAME FOR THE RECORD, PLEASE, SIR?

A LARRY OKOLI.

Q MR. OKOLI, ARE YOU THE BROTHER OF THE DEFENDANT IN THIS CASE, GORDON OKOLI?

A YES, I AM.

Q AND DO YOU LIVE ALSO IN THE CITY OF HOUSTON, SIR?

A YES, I DO.

Q DO YOU LIVE WITH EITHER OF YOUR TWO BROTHERS THERE OR DO YOU LIVE IN A SEPARATE RESIDENCE?

A I LIVE IN A SEPARATE PLACE.

Q MR. OKOLI, I WOULD ASK YOU WHEN IS THE LAST TIME THAT YOU SPOKE OR SAW YOUR BROTHER, GORDON OKOLI?

A THAT WAS LAST SUNDAY.

Q AND WHEN ON SUNDAY APPROXIMATELY -- WAS THAT A FACE TO FACE MEETING OR A TELEPHONE CALL? LET ME ASK YOU THAT FIRST.

A IT WAS A FACE TO FACE MEETING.

Q AND WHERE DID THAT TAKE PLACE?

A IT WAS AT THE RESIDENCE, THE HOUSE THAT MOMMA WAS STAYING AT.

Q THE HOUSE WHERE, SIR?

A OUR HOUSE.
Q THE HOUSE WHERE YOU RESIDE?
A NO, NOT WHERE I RESIDE.
Q WHERE MR. GORDON OKOLI RESIDES OR THE HOUSE WHERE YOUR
MOTHER STAYS?
A WHERE MY MOTHER RESIDES.
Q *NOW,* AT THE TIME -- WAS THIS MORNING OR AFTERNOON?
A IT WAS IN THE AFTERNOON.
Q DID YOUR BROTHER INDICATE TO YOU THAT HE INTENDED TO
TRAVEL ANYWHERE?
A YES, HE INDICATED TO ME THAT HE WAS GOING TO TRAVEL.
Q AND WHERE DID HE TELL YOU HE WAS GOING TO GO?
A MEMPHIS, TENNESSEE.
Q DO YOU KNOW HOW HE PLANNED TO GET FROM HOUSTON, TEXAS TO
MEMPHIS, TENNESSEE?
A I DIDN'T KNOW THAT.
Q YOU DIDN'T ASK AND HE DIDN'T TELL, IS THAT CORRECT, SIR?
A I ONLY -- HE ONLY TOLD ME WHY HE WAS GOING.
Q I DIDN'T ASK YOU WHY. I SAID HOW HE WAS GOING.
A *NO,* HE DIDN'T TELL ME HOW HE WAS GOING.
Q DID YOU ADVISE YOUR BROTHER OLIVER LATER THAT YOUR BROTHER
GORDON WAS GOING TO MEMPHIS, TENNESSEE?

A WELL, YES, THE FOLLOWING DAY.
Q AND HOW DID YOU NOTIFY YOUR BROTHER OLIVER?
A TT WAS OVER -- IT WAS OVER THE TELEPHONE.
Q DO YOU KNOW WHETHER OR NOT YOUR BROTHER GORDON SOUGHT
PERMISSION FROM EITHER THE COURT OR THE PROBATION OFFICER
BEFORE HE LEFT HOUSTON TO TRAVEL TO MEMPHIS, TENNESSEE?
A I DIDN'T KNOW THAT.
Q HAS YOUR BROTHER CALLED YOU SINCE SUNDAY, EITHER FROM
HOUSTON OR FROM MEMPHIS OR FROM ANYWHERE ELSE?
A NO.
Q HAS HE WRITTEN A LETTER TO YOU OR GOTTEN IN CONTACT WITH
YOU IN ANY WAY?
A NO.
Q DID YOU COMMUNICATE WITH MR. FRY THAT YOUR BROTHER HAD
GONE TO MEMPHIS, TENNESSEE?
A I DIDN'T BECAUSE I HAD BEEN BUSY AT WORK.
Q THAT'S A NO, SIR?
A IT WAS A NO.
Q WHEN WAS IT THAT YOUR BROTHER GORDON WAS PLANNING TO LEAVE
TO GO TO MEMPHIS, TENNESSEE?
A I DIDN'T KNOW THAT. HE DIDN'T TELL ME.
Q HE DIDN'T TELL YOU AND YOU DIDN'T ASK, IS THAT

CORRECT,
SIR?
A YES.
Q AND WHEN WAS HE GOING TO GET BACK?
A HE INDICATED THAT HE WAS GOING TO BE HERE -- HE WAS GOING
TO FLY IN TODAY WITH THE WITNESS THAT HE WAS GOING TO TENNESSEE TO BRING.
Q SO HE INDICATED THAT NO MATTER HOW HE GOT TO MEMPHIS IN
THE FIRST PLACE, HE WAS GOING TO FLY DIRECTLY IN TO EITHER
DALLAS OR TYLER OR SOMEWHERE WITH A WITNESS FOR THIS TRIAL, IS
THAT CORRECT?
A THAT WAS THE INDICATION THAT I GOT.
Q DID HE TELL YOU WHAT AIRLINE HE WAS GOING TO BE ON?
A NO, SIR.
Q DID HE ASK YOU TO PICK HIM UP AT THE AIRPORT?
A NO

MR. RIVERS: YOUR HONOR, I THINK THAT'S ALL THE QUESTIONS WE HAVE AT THIS TIME.

THE COURT: MR. FRY?

MR. FRY: YES, YOUR HONOR.

CROSS EXAMINATION

BY MR. FRY:
Q MR. OKOLI, DID YOUR BROTHER GORDON, DID HE TELL YOU HE WAS

ACTUALLY LEAVING OR DID HE TELL YOU HE WAS CONSIDERING LEAVING
OR HOW WAS IT PHRASED? WAS IT A DEFINITE DECISION THAT YOU
THOUGHT THAT HE WAS LEAVING FOR SURE OR THAT HE WAS CONSIDERING IT?

A THAT HE WAS INTENDING TO. HE WAS CONSIDERING.

Q HE WAS CONSIDERING LEAVING?

A YES.

Q YOU DON'T KNOW FOR SURE THAT HE LEFT?

A I DON'T KNOW FOR SURE.

Q AS OF THIS TIME YOU DON'T KNOW WHERE HE IS RIGHT NOW?

A YES -

THE COURT: THEY ALWAYS ANSWER THE QUESTION EXACTLY
RIGHT.

A YES. I DON'T KNOW WHERE HE IS AT.

Q OKAY. AND TO YOUR KNOWLEDGE, THE LAST CONVERSATION WITH
HIM, HE INTENDED TO BE HERE TODAY FOR THIS TRIAL?

A THAT'S CORRECT.

Q AND HE NEVER TOLD YOU THAT HE WOULD NOT APPEAR FOR TRIAL,
HAS HE?

A NO.

MR. FRY: NOTHING FURTHER.

THE COURT: MR. OKOLI.

A YES, YOUR HONOR.

THE COURT: HAVE YOU OR YOUR BROTHER, THE GENTLEMAN WHO TESTIFIED PREVIOUS TO YOU, HAVE Y'ALL BEEN BACK IN TOUCH WITH ANY OF YOUR FAMILY IN HOUSTON SINCE YOUR BROTHER DID NOT SHOW UP THIS MORNING? HAVE Y'ALL CALLED DOWN THERE AND INQUIRED ABOUT HIM?

A. YES, YOUR HONOR.

THE COURT: DID--DID ANYONE DOWN THERE KNOW OF HIS LOCATION OR WHERE HE MAY BE?

A MY BROTHER TOLD ME -- THAT'S A NO. MY BROTHER TOLD ME THAT NOBODY KNEW WHERE HE WAS.

THE COURT: DID Y'ALL CALL YOUR -- I UNDERSTAND YOUR MOTHER LIVES IN HOUSTON.

A YES, YOUR HONOR.

THE COURT: DID ANYONE CALL HER THIS MORNING?

A MY BROTHER DID.

THE COURT: AND SHE DID NOT KNOW MR. OKOLI'S WHEREABOUTS?

A YES, YOUR HONOR.

THE COURT: OKAY, DO YOU KNOW OF ANY REASON, MR. OKOLI, WHY YOUR BROTHER, MR. GORDON OKOLI, IS NOT IN COURT

TODAY OTHER THAN DECIDING NOT TO BE HERE? CAN YOU GIVE US ANY
REASON ON WHICH YOU RAVE ANY FACTS TO BASE IT AS TO WHY HE IS
NOT HERE TODAY OTHER THAN JUST DECIDING NOT TO BE HERE?
A I DON'T HAVE ANY REASON WHATSOEVER, YOUR HONOR.
THE COURT: OKAY. THANK YOU, MR. OKOLI. YOU CAN STEP DOWN.
WITNESS: THANK YOU, YOUR HONOR.
THE COURT: THE GOVERNMENT ANNOUNCED READY FOR TRIAL THIS
MORNING. I TOOK THAT AS AN INDICATION OF A DESIRE TO GO
FORWARD. IS THAT STILL THE GOVERNMENT'S DESIRE?
MR. RIVERS: YOUR HONOR, COULD I RAVE A MOMENT?
THE COURT: WHILE YOU'RE TAKING THAT MOMENT, I WILL
ASK MR. FRY. MR. FRY, YOU OBJECTED TO GOING FORWARD THIS
MORNING A-ND MOVED FOR A MISTRIAL. WHAT IS YOUR POSITION AT THIS TIME?
MR. FRY: MAY I HAVE JUST A MOMENT, YOUR HONOR?
THE COURT: Y'ALL CAN CONFER WITH EACH OTHER, IF YOU
WANT TO CONFER WITH THE GOVERNMENT, I GUESS.
LET ME SEE WHAT MR. FRY'S POSITION IS FIRST.
MR. FRY: WE WOULD CONTINUE OUR OBJECTION,

YOUR
HONOR, AND ASK FOR A MISTRIAL.

THE COURT: OKAY.

MR. RIVERS: YOUR HONOR, THE GOVERNMENT'S POSITION
IS THAT WE WERE PREPARED TO GO FORWARD THIS MORNING WHEN WE
GOT HERE AND WE HAVE IN FACT PROCEEDED TO DO SO. OUT OF AN
ABSOLUTE ABUNDANCE OF CAUTION, ALTHOUGH I SUPPOSE THE ANALOGY
WOULD BE THE BELL'S AT LEAST PARTIALLY RUNG AT THIS POINT,
RATHER THAN PROCEED WITH THE REST OF THE CASE, I THINK IT
WOULD BE PRUDENT TO RECESS THE CASE UNTIL IN THE MORNING TO
GIVE DEFENSE COUNSEL EVERY OPPORTUNITY TO ACCOUNT FOR HIS
CLIENT'S WHEREABOUTS, JUST TO REMOVE ANY FURTHER LINGERING
DOUBT.

IT IS MY BELIEF THAT MR. OKOLI HAS VOLUNTARILY ABSENTED
HIMSELF FROM THIS PROCEEDING, BUT I'M COGNIZANT OF CASE LAW
THAT WE NEED TO BE CAREFUL IN THAT INQUIRY.

AT THE SAME TIME -- WELL, BUT AT THE SAME TIME AS WELL,

YOUR HONOR, AND FOR PURPOSES OF THE RECORD, WE HAVE BROUGHT WITNESSES -- WE HAVE BROUGHT IN WITNESSES FROM DALLAS, FROM CARTHAGE. WE HAVE ASSEMBLED FOR TRIAL AND WE ARE HERE AND WE ARE PROCEEDING AND CONTINUE TO BE READY TO DO SO.

THE COURT: WHAT DO YOU THINK THE POSITION IS WE ARE ALL IN IF MR. OKOLI SHOWS UP IN THE MORNING?

MR. RIVERS: WELL, A LOT OF THAT IS GOING TO DEPEND ON WHAT HIS EXPLANATION IS FOR WHERE HE'S BEEN AND WHAT HE'S BEEN DOING, I IMAGINE.

THE COURT: MR. FRY'S POSITION, HE WOULD MOVE FOR MISTRIAL AND ASK THAT A NEW JURY BE BROUGHT IN AT A LATER DATE SO THAT HE COULD HAVE HIS CLIENT HERE TO --

MR. RIVERS: AND THAT MAY WELL BE THE CASE. I GUESS MY RECOMMENDATION AT THIS POINT, YOUR HONOR, WOULD BE TO PROCEED TO A CONCLUSION WITH THE EVIDENCE. I DON'T KNOW THAT -- MY EXPECTATION IS THAT WE WILL CONCLUDE FAIRLY SHORTLY WITH THE EVIDENCE IN THIS CASE.

THE COURT: WELL, BUT YOU'RE ASKING FOR A RECESS UNTIL TOMORROW MORNING TO PRESENT ANY OTHER EVIDENCE, ARE YOU NOT?

MR. RIVERS: WELL, I'M TRYING TO WEIGH THIS OUT AS I GO, IT'S LIKE I JUST TOLD THE COURT, THE BELL'S ALREADY PARTIALLY RUNG AND IF HE DOES COME IN AND IF HE DOES RAVE A GOOD REASON, THEN A MISTRIAL WOULD BE GRANTED ANYWAY. BUT I'M ALSO COGNIZANT OF THE FACT THAT WE BROUGHT WITNESSES IN FROM DALLAS AND WE ARE PREPARED TO GO FORWARD AND COMPLETE THE TRIAL.

THE COURT: DO YOU HAVE ANY SUGGESTIONS, MR. FRY?

MR. FRY: I DON'T REALLY SEE HOW -- SINCE WE HAVE ALREADY STARTED THE TRIAL WITHOUT MR. OKOLI, I DON'T SEE HOW WAITING UNTIL TOMORROW TO SEE IF HE APPEARS WOULD SOLVE ANYTHING. IF WE WERE IN A POSITION WHERE WE HADN'T STARTED THE TRIAL, THEN I WOULD TRY TO CONTINUE THE CASE AS LONG AS POSSIBLE. I THINK FROM MY STANDPOINT, THE DAMAGE HAS ALREADY

BEEN DONE. WE STARTED THE CASE WITHOUT HIM. I DON'T THINK
THAT CAN BE REMEDIED.

THE COURT: IF MR. OKOLI SHOWS UP TOMORROW -- IF WE
GO ON WITH THIS TRIAL TODAY AND IF A VERDICT IS RETURNED TODAY
AND MR. OKOLI SHOWS UP TOMORROW, WHICH IS WHAT YOU'RE ASKING
ME TO DO, I THINK HE WOULD BE ELIGIBLE PROBABLY FOR A NEW
TRIAL AT THAT TIME ANYWAY, SO I DON'T

MR. RIVERS: DEPENDING ON WHAT KIND OF FINDINGS THE
COURT HAS MADE TODAY. I THINK THE STANDARD THAT WOULD BE
APPLIED WOULD BE WHAT FINDINGS THE COURT HAS MADE ON THIS
OCCASION.

THE COURT: WELL, THE COURT CAN MAKE FINDINGS ON
THIS OCCASION THAT MAY VERY WELL, BECAUSE OF INTERVENING
CIRCUMSTANCES, TURN OUT NOT TO BE TRUE.

MR. RIVERS: ABSOLUTELY, YOUR HONOR, BUT I'M
ASSUMING THAT HE CAME IN LATER, AND WHATEVER HIS REASON FOR
NOT BEING HERE WAS NOT SATISFACTORY TO THE COURT, I STILL

THINK THAT THE STANDARD THAT WOULD APPLY IS WHAT THE FINDINGS
WERE THAT THE COURT MADE TODAY.

THE COURT: ALL RIGHT. GENTLEMEN, I FIND THAT NO ONE HAS BEEN ABLE TO PRESENT ME WITH ANY REASON THAT IS
INCONSISTENT WITH VOLUNTARY ABSENTING -- MR. GORDON OKOLI
VOLUNTARILY ABSENTING HIMSELF FROM THIS COURT'S JURISDICTION
IN THIS PARTICULAR TRIAL.

I FURTHER FIND FROM THE EVIDENCE ADDUCED THAT MR. OKOLI
HAS NOT MADE ANY CONTACT WITH HIS ATTORNEY OR LAWYERS WITHIN
THE LAST SEVERAL DAYS. AS A MATTER OF FACT, I BELIEVE THE
TESTIMONY WAS EITHER THAT *NO ONE* RAS HEARD FROM SINCE SATURDAY
WAS THE TESTIMONY.

MR. RIVERS: SUNDAY, YOUR HONOR, WAS THE LAST HE
TALKED TO HIS BROTHER LARRY.

THE COURT: WELL, ONE OF THEM SAID SATURDAY AND THEN
I THINK THE OTHER ONE SAID HE HAD TALKED TO HIM SUNDAY, WHICH
IS A PERIOD OF SOME FOUR DAYS.

IT'S ALSO EVIDENT FROM THE TESTIMONY THAT AT

THE VERY LEAST MR. OKOLI WAS ALREADY TAKING THE ORDERS FROM THE COURT LIGHTLY BY ABSENTING HIMSELF FROM THE SOUTHERN AND EASTERN DISTRICT OF TEXAS IN WHICH HE HAD BEEN ORDERED TO STAY.

BASED ON HIS INTENT TO ABSENT -- HIS EXPRESSED INTENT TO ABSENT HIMSELF FROM THE EASTERN AND SOUTHERN DISTRICTS, BASED ON THE FACT THAT HE HAS NOT CONTACTED ANYBODY SINCE SUNDAY, HAS NOT TALKED TO HIS LAWYER SINCE THURSDAY, I THINK THAT THE DEFENDANT ABSENTED HIMSELF FROM THIS COURT'S JURISDICTION.

I THINK I CAN GIVE SOME WEIGHT AND I DO GIVE SOME WEIGHT TO THE FACT THAT MR. OKOLI IS A FOREIGN NATIONAL AND HAS RELATIVES LIVING I17 A COUNTRY OUTSIDE THE UNITED STATES.

BASED ON THOSE REASONS, I THINK THAT IT WOULD BE AN UNDUE INCONVENIENCE ON THIS COURT TO CONTINUE THIS TRIAL ANY FURTHER. THAT IS, TO CONTINUE AND SET THE CASE OFF. WE ARE GOING TO CONTINUE THE TRIAL.

ALL RIGHT. ANY REASON WE SHOULDN'T BRING THE JURY IN AT THIS TIME?

MS. COZBY: NO, YOUR HONOR.

MR. FRY: NO, YOUR HONOR.

THE COURT: ALL RIGHT. BRING THE JURY IN.

(JURY SEATED IN THE JURY BOX.

THE COURT: PLEASE BE SEATED. I KNOW I TOLD Y'ALL TO BE BACK AT 1:15 AND Y'ALL WERE AND WE FINALLY GET YOU IN THE COURTROOM AT A QUARTER TILL. ALL OF THE TRIALS DON'T GO LIKE THIS. A LOT OF THEM DO. BUT I APOLOGIZE FOR THAT. WE HAVE BEEN HERE SINCE ONE WORKING, SO I DON'T WANT YOU TO THINK IT'S THE LAWYERS' FAULT THAT Y'ALL HAVE HAD AN EXTRA LONG LUNCH HOUR.

ALL RIGHT. WHERE ARE WE? ARE YOU READY TO CALL YOUR NEXT WITNESS?

MS. COZBY: YES, YOUR HONOR, RICK CHEEK.

THE COURT: MR. CHEEK, I BELIEVE YOU HAVE PREVIOUSLY BEEN SWORN.

WITNESS: YES, YOUR HONOR.

RICK CHEEK, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION